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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/702,193	11/05/2003	Russell L. Kelley	P123C	7111

EXAMINER
TRAN, SUSAN T

ART UNIT	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/702,193

Applicant(s)

KELLEY, RUSSELL L.

Examiner

Susan T. Tran

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart EP 0 678 247 A1, in view of Stitt US 5,110,592 and, Nawar US 6,641,847 or DE 4042354 (DE '354).

Reinhart teaches a pet food product comprising fatty acid, e.g., omega-6 and omega-3 in the ratios of from 3:1 to 10:1 (see abstract, and page 2, lines 1-30). The product further comprises fiber, minerals, carbohydrates, 30-34% protein, and 20-23% fat (page 3, lines 13-54). The product can be used to treat and maintain companion animals, such as dogs or cats (page 3, lines 25-31).

Reinhart is silent as to the use of the product for enhancing or promoting reproductive performance.

Stitt teaches an animal feed blend comprising fatty acid to increase live births and improve the fertility of animals (see abstract, and columns 3-4). Stitt teaches the use of flaxseed in the feed (ID). Stitt does not explicitly teach the present of omega-6. However, it is known in pharmaceutical art that flaxseed contains both omega-3 and omega-6 fatty acid. However, to be more specific, Nawar teaches foodstuff comprising omega-6 (linoleic acid), which promotes reproduction, overall growth, healthy skin, and cardiovascular health (column 7, lines 50 through column 8, lines 1-40).

DE '354 teaches animal feed comprising linoleic acid (omega-6), wherein the feed promotes fertility, improves performance, and glossy coat (abstract). Thus, it would have been obvious to one of ordinary skill in the art to use the food product rich in

fatty acid taught by Reinhart to promote fertility/performance/reproduction in view of the teachings of Stitt and Nawar or DE '354 to obtain the claimed invention. This is because Stitt teaches an animal feed rich in fatty acid such as omega-3 fatty acid to promote fertility, because Nawar and DE recognize fatty acid such as omega-6 fatty can also be use to promote fertility, and because Reinhart teaches an animal feed rich in fatty acid to promote an overall health. One of ordinary skill in the art would have been motivated to combine omega-3 and omega-6 to improve fertility/performance/reproduction since the prior arts teach using fatty acids including omega-3 and omega-6 to promote fertility in animal is well known in the art.

Response to Arguments

Applicant's arguments filed 10/18/07 have been fully considered but they are not persuasive.

To clarify the record, the 103(a) rejection of record is over Reinhart, in view of Stitt and, Nawar or DE '354. In the last office action, a typographical error indicated Avav et al. in place of Stitt. However, it is clear that Stitt was discussed throughout the rejection.

Applicant argues that Reinhart does not provide any teaching of the use of fatty acids for anything with respect to reproduction. Reinhart only teaches using fatty acids in reducing allergic and inflammatory response in order to improve skin appearance. Thus, there can be no expectation of success for using fatty acids to enhance reproductive performance found in Reinhart.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Reinhart is cited in view of Stitt and, Nawar or DE '354 for the teaching of the claimed invention.

Applicant argues that Stitt fails to remedy the deficiencies of Reinhart. Stitt only discloses the use of omega-3 fatty acids, and teaches nothing with respect to the use of omega-6 fatty acids for any purpose. Stitt discloses only omega-3 fatty acids derived from flaxseed, and their use in increasing the number of live births to a female animal, the only example of which, with respect to Stitt, is swine. Thus, Stitt provides no teaching of a combination of omega-3 and omega-6 fatty acids in any animal for any purpose.

However, it is noted that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Stitt is cited in combination with Nawar or DE '354 for the teaching of omega-6.

Applicant argues that Nawar provides a simple statement, as cited by the Examiner, that "these fatty acids have also been associated with various health benefits relating to overall growth, healthy skin, reproduction, and cardiovascular health." Col. 8, lines 37 - 40. Nawar, however, provides no teaching as to any particular ratio of omega-

6 to omega-3 or any significance that a ratio may have on an animal's reproductive performance. DE '354 teaches that a composition comprising, among other ingredients, 17% linoleic acid and 50% linolenic acid can promote fertility.

However, in response to applicant's argument, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). In the present case, the secondary references clearly suggest that omega-3 fatty acid as well as omega-6 fatty is well known in pharmaceutical art to promote health and fertility in animal. Therefore, in view of the teachings in the secondary references, it would have been obvious to one of ordinary in the art to, by routine experimentation using the food product taught by Reinhart which comprises both omega-3 and omega-6 as a pet food formulation that help maintain general health condition in companion animals.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Correspondence


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan T. Tran whose telephone number is (571) 272-0606. The examiner can normally be reached on M-R 6:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



S. Tran
Primary Examiner
Art Unit 1615